IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	**)**	
	)	
EAST SHOSHONE HOSPITAL DISTRICT, a municipality,	**) Case No. 98-20934-9**	
	)	
	)	
Debtor.	**) MEMORANDUM OF DECISION**	
	)	
_____)		

HONORABLE TERRY L. MYERS, UNITED STATES BANKRUPTCY JUDGE

Stephen B. McCrea, Coeur d'Alene, Idaho, for Debtor.

H. James Magnuson, Coeur d'Alene, Idaho, for creditor Magnuson Family Trust.

INTRODUCTION

Before the Court is the motion of East Shoshone Hospital District, a chapter 9 Debtor (the "Debtor") to set aside a prior stipulation between the Debtor and creditor Magnuson Family Trust (the "Trust"). Also, before the Court is the motion of the Trust to dismiss this case based upon the failure of the Debtor to comply with its confirmed plan. Having considered the submissions of the parties and the relevant authorities, the

Court determines that the motion of the Debtor to set aside the stipulation must be denied, and the motion of the Trust is well taken. The case will be dismissed.

BACKGROUND

This chapter 9 reorganization was filed by the Debtor on October 14, 1998. On June 8, 1999 the Debtor and the Trust entered into a "Stipulation Regarding Wallace Medical Clinic Building" (the "Stipulation") which was filed with the Court on June 11. The Stipulation provided that "the deed of trust and promissory note relating to the Wallace Medical Clinic building, originally executed in 1988 and attached hereto as Exhibit A, will be confirmed." The Stipulation went on to establish payment terms. This included the parties' agreement that the Trust had an allowed secured claim of $183,241.00 and requiring payments to begin thirty days after the effective date of the Debtor's confirmed plan based upon a thirty-year amortization schedule at 7.5% interest with a balloon payment in ten years.

The Stipulation was incorporated by the Debtor in its chapter 9 plan. The plan was confirmed by an Order entered on June 29, 1999.

In February 2000, the Debtor filed a Motion to Revoke Stipulation Regarding Wallace Medical Clinic Building (the "Motion").[1] At approximately the same time, creditor First Security Bank moved to dismiss the case under § 930(a)(6)(A) based upon the Debtor's alleged default in performance of the plan as it related to the Bank.

[1] The Debtor changed counsel immediately before this Motion was filed.

The Trust "joined" in First Security Bank's motion to dismiss[2] and in such pleading urged its own motion to dismiss under § 930(a)(6)(A) based upon the Debtor's failure to meet its obligations to the Trust under the confirmed plan and the Stipulation. Predictably, the Trust also resisted the Debtor's attempt to set aside the Stipulation.

DISCUSSION

The Debtor's Motion is premised upon the view that the transaction between the Debtor and the Trust violates Article VIII, § 3 of the Idaho Constitution which provides in pertinent part:

> No county, city, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two thirds (2/3) of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provisions shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within thirty (30) years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: Provided, that this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state . . . .

[2] First Security Bank subsequently vacated hearing on its § 930(a)(6)(A) motion.

Assuming for the purpose of this opinion that the Debtor could present a colorable argument[3], the focus must shift from the Idaho Constitution to Title 11 of the United States Code.

I. Finality; Effect of Confirmation

Once the Court confirmed the Debtor's chapter 9 plan of reorganization, § 944 became operative. That section provides:

> **Effect of confirmation**
>
> (a) The provisions of a confirmed plan bind the debtor and any creditor, whether or not–
>
> (1) a proof of such creditor's claim is filed or deemed filed under section 501 of this title;
>
> (2) such claim is allowed under section 502 of this title; or
>
> (3) such creditor has accepted the plan.
>
> (b) Except as provided in subsection (c) of this section, the debtor is discharged from all debts as of the time when–
>
> (1) the plan is confirmed;
>
> (2) the debtor deposits any consideration to be distributed under the plan with a disbursing agent appointed by the court; and
>
> (3) the court has determined–
>
> (A) that any security so deposited will constitute, after distribution, a valid legal obligation of the debtor; and
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> (B) that any provision made to pay or secure payment of such obligation is valid.

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[3] The Debtor has not asked for a ruling at this time upon the validity of the transaction. In fact, the Debtor stated in its brief in support of the Motion: "The remainder of this brief will assume, for the sake of argument, that the contention of the debtor [regarding the constitutional question] is correct, keeping in mind that Magnuson [Family Trust] should have the opportunity to respond and present evidentiary facts contesting the allegations and law set forth above." Brief at 7.

> (c) The debtor is not discharged under subsection (b) of this section from any debt–
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> (1) excepted from discharge by the plan or order confirming the plan; or
>
> (2) owed to an entity that, before confirmation of the plan, had neither notice nor actual knowledge of the case.

Under the plain meaning of § 944(a), the confirmed plan binds the Debtor as well as creditors treated under the plan. Section 944(a).[4] *In re Orange County*, 219 B.R. 543, 558-59 (Bankr. C.D. Cal. 1997) (confirmation of chapter 9 plan is binding under *res judicata* principles). The plan expressly incorporated the Stipulation. The confirmation order was never appealed and is final. The motion contravenes the principle of finality and the binding effect of confirmation.[5]

II. Retained jurisdiction

Under § 945(a), the Court may retain jurisdiction for a period of time following confirmation of a chapter 9 plan as is necessary for the successful implementation of the plan. The Court here explicitly retained such jurisdiction in order to address a dispute the

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[4] As stated in *Gardenhire v. United States Internal Revenue Service (In re Gardenhire)*, 2000 WL 381593 at 3 (9th Cir. 2000):

> Close adherence to the text of the relevant statutory provisions and rules is especially appropriate in a highly statutory area such as bankruptcy. As the Supreme Court explained in *Rake v. Wade*, 508 U.S. 464, 113 S.Ct. 2187, 124 L.Ed.2d 424 (1993), also a case involving interpretation of the Bankruptcy Code in a Chapter 13 proceeding: "Where the statutory language is clear, our 'sole function ... is to enforce it according to its terms.' " Id. at 471 (citation omitted).

[5] These principles are strong enough to insulate confirmation of a plan with an improper provision or term. *See, In re Pardee*, 193 F.3d 1083 (9th Cir. 2000), affirming 218 B.R. 916 (9th Cir. BAP 1998) (regarding chapter 13).

Debtor had with certain creditors (other than the Trust) which were not fully resolved at the time of confirmation.[6] Also, the plan provides:

> The Court will retain jurisdiction until the Plan has been fully consummated, including but not limited to, the following purposes:
>
> 1. The classification of the claim of any creditor and the re-examination of the claims which have been allowed for purposes of voting, and the determination of such objections as may be filed by the reorganized East Shoshone Hospital District to creditors claims. The failure of the reorganized East Shoshone Hospital District to object to, or to examine any claim for the purpose of voting, shall not be deemed to be a waiver of the reorganized East Shoshone Hospital District's right to object to, or reexamine the claim in whole or in part.
>
> 2. The determination of all questions and disputes regarding title to assets of the estate, and determination of all causes of action, controversies, disputes, or conflicts, whether or not subject to action pending as the date of confirmation, between the Reorganized East Shoshone Hospital District and any other party including but not limited to any right of the Reorganized East Shoshone Hospital District to recover assets pursuant to the provisions of Title 11 of the United States Code, and to maintain actions for recovery of preferential and fraudulent transfers.
>
> 3. The correction of any defect, the curing of any omission, or the reconciliation of any inconsistency in this Plan or the Order of Confirmation, as may be necessary to carry out the purpose and intent of this Plan.
>
> 4. The consideration of any modification of this Plan after confirmation pursuant to the Bankruptcy Rules and Title 11 of the United States Code.
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> 5. The enforcement and interpretation of the terms and conditions of this Plan.
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> 6. The determination of any avoidance actions commenced by East Shoshone Hospital District for the benefit of the estate/unsecured creditors.

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[6] This concerned the claims of Chris and Gayle Christensen.

> 7. The entry of any order, including injunctions, necessary to enforce the title, rights, and powers of the reorganized East Shoshone Hospital District and to impose such limitations, restrictions, terms and conditions of such title, rights and powers as this Court may deem necessary.

Nothing in these plan provisions, or in § 945, purports to grant the Debtor the right to revisit or alter its Stipulation with the Trust, or the plan's agreed upon and required treatment of that creditor.

III. Post-confirmation modification

Chapter 9 contains no provision allowing for modification of a plan after confirmation.[7] In this regard, it is unlike chapter 11 or chapter 12 which have such provisions. *See* § 1127(b), § 1229(a). It appears clear that Congress knew how to provide for post-confirmation modifications when it intended that right or power to exist. The Court must conclude that the absence of a correlative provision in chapter 9 was intentional. A plain reading of the Code indicates that, in chapter 9, post-confirmation modifications are not allowed.

Debtor relies upon *Ault v. Emblem Corporation (In re Wolf Creek Valley Metropolitan District No. IV),* 138 B.R. 610 (D. Colo. 1992) which recognized the Court's continuing jurisdiction following confirmation of a chapter 9 plan of reorganization, including an "inherent ability" of the Court to modify the plan

[7] Chapter 9 provisions concerning modification apply only to the pre-confirmation stage. *See* § 942. Section 901, which incorporates various provisions of chapter 11, incorporates only § 1127(d) and not § 1127(b).

post-confirmation in order to correct matters which arose through surprise or mistake. 138 B.R. at 619-20.[8]

Wolf Creek is distinguishable. There the offended party was unable to obtain counsel in time to file an appeal within ten days of the confirmation order but actively pursued in a timely fashion a remedy for what it saw as errors in the order of confirmation. Unlike *Wolf Creek*, the motion here is urged by the Debtor itself, who proposed both the Stipulation and the plan, obtained confirmation and enjoyed the benefits of a confirmed reorganization of its affairs. The situation is quite dissimilar.

Wolf Creek relies greatly upon the "inherent" powers of the Court. But if this Court were to use those powers as the Debtor here urges, the result would be to

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[8] However, the case upon which *Wolf Creek* relies, *American United Life Insurance Company v. Haines City*, 117 F.2d 574 (5th Cir. 1941), is not as supportive as it at first blush might appear, since it was incompletely quoted. *Wolf Creek* relies upon the following statement quoted from *Haines City*:

> We are unwilling to put a plan into such a straight jacket. It may be that some other matter has been overlooked or has subsequently arisen which makes the plan unworkable and complicated, but which could easily and justly be remedied. Surprise or mistake may effect it. There ought to be some leeway for such adjustments.

117 F.2d at 576. However, *Haines City* continues:

> But a composition is in its essence a contract, proposed by the debtor and agreed to by those of the creditors who give consent, and they in the requisite majority bind all. The interlocutory decree confirms it and establishes it as regular and lawful. A composition after confirmation ought to be respected as a contract, and not disturbed in its substance for light cause, or so as to give one party an advantage over the other; and especially so after partial execution.

Id.

negate the *res judicata* effect of confirmation as expressly established by § 944. Such an approach would also ignore the absence of any statutory authority for post-petition modification. This is improper. Any inherent or equitable powers of the Court, including those found in § 105, must be applied consistently with, and not in derogation of, the express provisions of the Code. *American Hardwoods, Inc. v. Deutsche Credit Corporation (In re American Hardwoods, Inc.),* 885 F.2d 621 (9th Cir. 1989); *In re Golden Plan of California, Inc.*, 829 F.2d 705, 713 (9th Cir. 1986) (bankruptcy courts equitable powers are strictly confined within the limits of the Bankruptcy Code.) Indeed, § 105 grants the Court the authority to enter orders as "necessary or appropriate to carry" the Code's provisions or similarly necessary to "enforce or implement" its prior orders. Here the Debtor would have the Court use such powers not to effectuate but to contravene provisions of the Code and the provisions of the Court's prior confirmation order.

IV. Revocation of confirmation

Section § 901 incorporates by reference § 1144 which provides for revocation of an order of confirmation. The Debtor argues that it should be allowed to "partially" revoke confirmation in order to strike the plan provisions dealing with the Trust.

There is nothing in the statute, nor has there been authority provided by the Debtor, which recognizes or validates a theory of selective or partial revocation of a chapter 9 plan.[9] Either an order of confirmation is revoked or it is not.

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[9] The Debtor believes *In re A.J. Mackie Company*, 50 B.R. 756 (Bankr. D. Utah 1985) provides for such a partial or selective revocation. The Court disagrees. That case dealt not with "partial revocation" but with the discretion of the Court in a chapter 11

Additionally, § 1144 by its own terms limits revocation of a confirmation order for a period of 180 days following confirmation. Here confirmation occurred on June 29, 1999. Thus § 1144 ceased to be applicable on December 29, 1999. The Motion is untimely.[10]

V. Relief from order

The request of the Debtor asks for relief from its own Stipulation and from the order it obtained confirming its plan. But relief from that prior order has not been sought under Rules 9023 or 9024. There are multiple limitations upon relief from valid and binding judgments and orders under those provisions. The request of the Debtor, in the Court's view, cannot be properly placed under any of the subdivisions of these rules. The Court is not persuaded that grounds for relief from the agreed order exist, or that the Debtor can, in addition to changing counsel, change its fundamental approach to the treatment of this debt having once entered into a Stipulation and having confirmed a plan based thereupon.[11]

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context to enter a post-confirmation modification to delete provisions which the Court might believe it did not have jurisdiction in the first instance to confirm. As noted above, the authority for post-confirmation modification in chapter 11 has a different statutory predicate, one absent in chapter 9. Additionally, even the *Mackie* court recognized that such discretion had to be exercised with concern for the rights of those who may be prejudiced by such an approach. That certainly is an apt observation here.

[10] Section 1144 also authorizes revocation "if and only if such order [of confirmation] was procured by fraud." No such showing has been made.

[11] The Court is sensitive to the general principle of finality of settlements, as well as to the statutory issues which have been addressed. Idaho law is clear that settlements should be respected and encouraged, and constitute binding contracts between the settling parties. *Wilson v. Bogert*, 81 Idaho 535, 542, 347 P.2d 341, 345 (1959). *See also*, *Suitts v. First Security Bank of Idaho*, 125 Idaho 27, 32, 867 P.2d 260, 265 (Ct. App. 1993).

CONCLUSION

Here the proposed modification changes dramatically the treatment of the Trust under the plan. It does not simply correct some overlooked matter nor does it address something which has arisen to the mutual surprise of the parties after confirmation. It is a direct and frontal assault upon the finality of the confirmation order. Under and in light of § 944(a) and the principles of finality and *res judicata*, and in the absence of authority to modify the plan or partially revoke confirmation, and with no right to relief from order pleaded or proven, the attack must fail.

Based upon the foregoing, the Court finds no basis upon which the Debtor may validly set aside its prior Stipulation or its order of confirmation. For that reason, there is no reason to set the matter over for an evidentiary hearing on the question of the alleged Constitutional infirmity. The Motion to Revoke Stipulation Regarding the Wallace Medical Clinic Building will in all regards be denied.

MOTION TO DISMISS

As noted, the Trust has moved to dismiss this case under § 930(a)(6)(A). That section provides as follows:

> (a) After notice and a hearing, the court may dismiss a case under this chapter for cause, including–
>
> > (6) If the court has retained jurisdiction after confirmation of a plan–

The settlement between this chapter 9 debtor and its creditor is no less important than the settlement of disputes as generally discussed in Idaho case law.

> (A) material default by the debtor with respect to a term of such plan; or
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> (B) termination of such plan by reason of the occurrence of a condition specified in such plan.

The Trust has alleged that the Debtor has failed to comply with the terms of the stipulation and the confirmed plan. The Debtor does not contest this fact but, rather, has sought by the Motion to avoid its obligation to perform. That attempt having been found improper, the Court discerns no factual or other legal defense to the allegations of the Trust concerning non-performance under the confirmed plan. The Court will therefore grant the motion of the Trust, and this case shall be dismissed.

An Order consistent with the foregoing shall be entered.

Dated this 27th day of April, 2000.